Mohamed Hafiz Mohamed Nordin v Eric Paulsen and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1668–08 OF 2017
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
26 NOVEMBER 2018

Tort — Defamation — Impugned statements — Plaintiff sued defendant for defamation — Whether impugned statement defamatory — Whether defendant established that impugned statement true or substantially true — Whether defence of justification proven — Whether defendant made unverified allegations — Whether defence of fair comment proven — Whether damages awarded reasonable

Eric Paulsen ('the plaintiff') sued Mohamed Hafiz Mohamed Nordin ('the defendant') at the High Court for defamation arising from an article entitled 'Jangan Biar Eric Paulsen bebas tanpa perbicaraan' published via the website of Portal Islam & Melayu at on or around 9 February 2015. The High Court found that: the impugned statement was published by the defendant; the impugned statement referred to the plaintiff; the impugned statement was not defamatory of the plaintiff; the defendant failed to prove the defence of justification and fair comment; and if the plaintiff had proven his case then the sum of RM100,000 would have been awarded as damages. Aggrieved by the decision, both the plaintiff and the defendant filed the present appeals. The plaintiff appealed against the decision of the High Court judge in dismissing the defamation suit ('Appeal 1490') whereas the defendant appealed against the finding of the High Court judge that the defendant failed to prove justification and fair comment, and that the sum of RM100,000 was the appropriate sum for damages if the plaintiff had been successful in proving his claim ('Appeal 1668'). The plaintiff submitted that the learned High Court judge erred in finding that the plaintiff failed to prove that the impugned statement was defamatory.

Held, allowing Appeal 1490, dismissing Appeal 1668 and setting aside the decision of the High Court judge with global costs of RM10,000 subject to payment of allocatur:

(1) The impugned statement in its natural and ordinary meaning was clearly defamatory of the plaintiff and adversely affecting his reputation. The impugned statement was derogatory, calculated to incite hatred and anger amongst the multi-religious groups and ethnicity in Malaysia. The impugned statement not only described the plaintiff as a fraudster, a liar

who incited hatred of the Islamic religion, but also as a person funded and supported by foreign entities, such as the United States of America and the European Union. In their natural and ordinary meaning, the impugned statement meant and was understood to mean by reasonable and ordinary readers of the article that the plaintiff was anti-Islam. Therefore, taking the bane and the antidote of the article published the impugned statement had only one purpose, that was, to tarnish the plaintiff's character and reputation (see paras 26–27).

(2) The defence of justification was a complete defence but to succeed in the defence of justification, it was imperative for the defendant to establish the truth of all the material statements in the words complained of. The court agreed with the learned High Court judge that the defendant failed to show to the court that what was said in the impugned statement was true or substantially true. Not a sliver of evidence was adduced by the defendant to support that the impugned statement was indeed precisely true or, if at all, even remotely true (see paras 29 & 32).

(3) The learned High Court judge had ruled that the defendant had made unverified allegations of the plaintiff and thus, the defendant could not succeed in the defence of fair comment. The court found no reason to interfere with the decision of the learned High Court judge and agreed that the defendant could not succeed in the defence of fair comment. Further, in respect of damages, the court found no reason to depart from the decision of the learned High Court judge that the sum of RM100,000 was a reasonable amount as damages (see paras 34–35 & 37).

[Bahasa Malaysia summary

Eric Paulsen ('plaintif') telah menyaman Mohamed Hafiz Mohamed Nordin ('defendan') di Mahkamah Tinggi kerana fitnah yang timbul daripada artikel bertajuk 'Jangan Biar Eric Paulsen bebas tanpa perbicaraan' yang diterbitkan melalui laman web Portal Islam & Melayu pada atau sekitar 9 Februari 2015. Mahkamah Tinggi mendapati bahawa: kenyataan yang diersoalkan telah diterbitkan oleh defendan; kenyataan yang dipersoalkan merujuk kepada plaintif; kenyataan yang dipersoalkan tidak memfitnah plaintif; defendan gagal membuktikan pembelaan justifikasi dan komen adil; dan jika plaintif telah membuktikan kesnya maka jumlah RM100,000 akan diawardkan sebagai ganti rugi. Terkilan dengan keputusan itu, kedua-dua plaintif dan defendan telah mamfailkan rayuan-rayuan ini. Plaintif telah merayu terhadap keputusan hakim Mahkamah Tinggi kerana menolak guaman fitnah ('Rayuan 1490') manakala defendan telah merayu terhadap dapatan hakim Mahkamah Tinggi bahawa defendan telah gagal membuktikan justifikasi dan komen yang adil, dan bahawa jumlah RM100,000 itu adalah jumlah yang sesuai untuk ganti rugi jika plaintif berjaya membuktikan tuntutannya ('Rayuan 1668'). Plaintif berhujah bahawa hakim Mahkamah Tinggi terkhilaf dalam dapatannya

bahawa plaintif telah gagal membuktikan kenyataan yang dipersoalkan itu adalah fitnah. A

Diputuskan, membenarkan Rayuan 1490, menolak Rayuan 1668 dan mengetepikan keputusan hakim Mahkamah Tinggi dengan kos keseluruhan RM10,000 tertakluk kepada bayaran alokatur: B

(1) Kenyataan yang dipersoalkan dalam maksud semula jadi dan biasa jelas memfitnah plaintif dan menjejaskan reputasinya. Kenyataan yang dipersoalkan adalah menghina, dikira untuk menghasut kebencian dan kemarahan di kalangan kumpulan berbilang agama dan etnik di Malaysia. Kenyataan yang dipersoalkan itu bukan hanya menggambarkan plaintif sebagai penipu, pembohong yang menghasut kebencian terhadap agama Islam, tetapi juga sebagai orang yang dibiayai dan disokong oleh entiti asing, seperti Amerika Syarikat dan Kesatuan Eropah. Dalam makna semula jadi dan biasa, kenyataan yang dipersoalkan itu dimaksudkan dan difahami oleh para pembaca yang munasabah dan biasa artikel itu bahawa plaintif adalah seorang yang anti-Islam. Oleh itu, dengan mengambil kira kutukan dan penawar artikel itu diterbitkan kenyataan yang dipersoalkan hanya ada satu maksud, iaitu untuk menjejaskan watak dan reputasi plaintif (lihat perenggan 26–27). C D E

(2) Pembelaan justifikasi adalah pembelaan yang lengkap tetapi untuk berjaya dalam pembelaan justifikasi, adalah penting bagi defendan membuktikan kebenaran semua kenyataan material dalam kata-kata yang diadukan. Mahkamah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa defendan telah gagal menunjukkan kepada mahkamah bahawa apa yang dikatakan dalam kenyataan yang dipersoalkan adalah benar atau sebahagian besarnya benar. Tiada satu keterangan yang dikemukakan oleh defendan untuk menyokong bahawa kenyataan yang dipersoalkan itu sememangnya benar atau, jika sama sekali, walaupun jauh daripada benar (lihat perenggan 29 & 32). F G

(3) Hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa defendan telah membuat tuduhan yang tidak disahkan oleh plaintif dan oleh itu, defendan tidak dapat berjaya dalam pembelaan komen yang adil. Mahkamah mendapati tidak ada sebab untuk mengganggu keputusan hakim Mahkamah Tinggi yang bijaksana dan bersetuju bahawa defendan tidak dapat berjaya dalam pembelaan komen yang adil. Selanjutnya, berkenaan dengan ganti rugi, mahkamah tidak mendapati alasan untuk tidak mengikut keputusan hakim Mahkamah Tinggi yang bijaksana bahawa jumlah RM100,000 adalah jumlah yang munasabah sebagai ganti rugi (lihat perenggan 34–35 & 37).] H I

Notes

For a case on impugned statements, see 12(1) *Mallal's Digest* (5th Ed, 2015) para 557.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321, HC (refd)

Chong Swee Huat & Anor v Lim Shian Ghee (t/a L&G Consultants & Education Services [2009] 3 MLJ 665, CA (refd)

Chua Jui Meng v Hoo Kok Wing & Anor [2000] 3 MLJ 1; [2000] 6 CLJ 390, HC (refd)

Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 4 MLJ 242, CA (folld)

Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310, CA (refd)

Keluarga Communication v Normala Samsudin [2006] 2 MLJ 700, CA (refd)

Sutherland and others v Stopes [1925] AC 47, HL (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)

Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)

Appeal from: Civil Suit No 22NCVC-66–09 of 2015 (High Court, Kuala Lumpur)

N Surendran (Lateefa Koya and Shahid Adli Kamaruddin with him) (Daim & Gamany) for the appellant.

Arik Zarik (Ahmad Kamal with him) (The Chambers of Arik and Kamal) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] There were two appeals before us emanating from a single judgment of the learned High Court judge given on 18 July 2017 dismissing the plaintiff's claim for defamation arising from an article published on the internet via the website of Portal Islam & Melayu at www.ismaweb.net on or around 9 February 2015. The two appeals are as follows:

(a) Civil Appeal No W-02(NCvC)(W)-1490–07 of 2017 ('Appeal 1490'); and

(b) Civil Appeal No W-02(NCvC)(W)-1668–07 of 2017 ('Appeal 1668').

[2] In Appeal 1490 the plaintiff appealed against the decision of the High Court judge dismissing the defamation suit. In Appeal 1668 the defendant appealed against the finding of the High Court judge that the defendant failed

to prove justification and fair comment, and that the sum of RM100,000 is the appropriate sum for damages if the plaintiff had been successful in proving his claim.

[3] After having heard and considered the submissions of the respective counsels we allowed Appeal 1490 and dismissed Appeal 1668. We now set out our grounds for doing so.

[4] For ease of reference in this judgment the parties will be referred to as they were in the High Court.

BACKGROUND

[5] The plaintiff is the executive director of 'Lawyers for Liberty', a human rights lawyers' non-governmental organisation. A well-known human rights lawyer and activist in this country, the plaintiff's views, opinions, statements, comments are frequently featured in the media, locally and internationally.

[6] The defendant is a member of the Pertubuhan Ikatan Muslimin Malaysia ('ISMA'), a non-governmental organisation established in 1997. ISMA's main focus is Islamic propagation in the country.

THE ALLEGED DEFAMATORY STATEMENTS

[7] On or around 9 September 2015 the plaintiff read an article published on the internet which went viral on social media. The alleged defamatory statement was in an article entitled 'Jangan Biar Eric Paulsen bebas tanpa perbicaraan' published on the internet on the website of Portal Islam & Melayu at www.ismaweb.net as follows:

> Apa yang penting kita buktikan Eric yang didukung oleh Amerika Syarikat dan Kesatuan Eropah sebagai fraud yang 'cari makan' dengan menipu, memfitnah itu telah menghasut masyarakat membenci Islam dengan tweet-tweetnya yang tidak bertanggungjawab. ('the impugned statement').

[8] There is no dispute as to the publication of the impugned statement as the defendant admitted that he had published the impugned statement, an excerpt taken from an interview with the author of the article, one Siti Fatimah Ishak.

[9] It is the plaintiff's pleaded case that the words used in their natural and ordinary meaning were defamatory and meant to mean, amongst others, that the plaintiff is a person who incites hatred against Islam. The defendant pleaded the defence of justification and fair comment.

A THE PLAINTIFF'S CASE

[10] The plaintiff's case against the defendant arose from a counterclaim against ISMA. On 15 May 2016, a consent judgment was entered between the plaintiff and ISMA where it was agreed that ISMA would retract the article from its website.

[11] Learned counsel for the plaintiff argued that the defendant as the publisher of the impugned statement must be held responsible for the republication to third parties. The case of *Chua Jui Meng v Hoo Kok Wing & Anor* [2000] 3 MLJ 1; [2000] 6 CLJ 390 was cited in support of the learned counsel's submission.

[12] It was argued by learned counsel for the plaintiff that the article containing the impugned statement referred to the plaintiff as his name was specifically mentioned with his role as the executive director of Lawyers for Liberty. The manner and the context in which the words were used were clearly defamatory of the plaintiff's reputation as a human rights lawyer and activist.

E THE DEFENDANT'S CASE

[13] The defendant pleaded the defence of justification on the basis that:

(a) Lawyers for Liberty receives foreign funding for the purpose of strategic litigation in order to advance human rights;

(b) the plaintiff and Lawyers for Liberty are supported by the United States of America and the European Union; and

(c) the plaintiff has made various statements on twitter which are untrue, false, perverse and/or caused hatred amongst Malaysians of multi faith.

[14] The defendant also pleaded fair comment as the subject matter was of public interest as it concerns the plaintiff's allegation that Jabatan Kemajuan Islam Malaysia (JAKIM) was promoting extremism through Friday prayer sermons.

THE HIGH COURT

[15] The High Court dismissed the plaintiff's claim and made the following findings as summarised by learned counsel for the plaintiff in his written submission:

(a) the impugned statement was published by the defendant;

(b) the impugned statement referred to the plaintiff;

(c) the impugned statement was not defamatory of the plaintiff; A

(d) the defendant failed to prove the defence of justification and fair comment; and

(e) if the plaintiff had proven his case then the sum of RM100,000 would have been awarded as damages. B

THE APPEAL

[16] The main crux of the plaintiff's appeal as set out in the memorandum of appeal is that the learned High Court judge erred in finding that the plaintiff failed to prove that the impugned statement was defamatory. C

DECISION

Whether the impugned statement was defamatory D

[17] Learned counsel for the plaintiff complained that the learned trial judge failed to consider the effect of the impugned statement which can be ascertained from the evidence adduced during trial. It was submitted before us that the impugned statement was indeed defamatory and that the defendant could not avail himself of any of the defences as pleaded in his defence. E

[18] It is trite that to establish the tort of defamation, the burden is on the plaintiff to prove that the impugned words are defamatory of the plaintiff. The plaintiff must establish, on the balance of probabilities the three requisite ingredients namely: F

(a) the words were defamatory;

(b) the words referred to the plaintiff; and G

(c) the words were published.

(See: *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316; [1989] 1 CLJ 152; [1989] 1 CLJ Rep 321 at p 324). H

[19] Mohamed Azmi J (as he then was) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58 said:

> ... the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty. I

[20] Justice Richard Malanjum J (as he was then) in *Tun Datuk Patinggi Haji Abdul-Rahman Ya' kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 at p 402 explained the correct approach in the construction of the words complained of:

> ... is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw.

[21] In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, LP Thean J, succinctly explained what is natural and ordinary meaning of the word at pp 318–319:

> In determining the natural and ordinary meaning of the words complained of, the sense or meaning intended by the appellant is irrelevant. Nor for such purpose is the sense or meaning in which the words were understood by the respondent relevant. Nor is extrinsic evidence admissible in construing the words. The meaning must be gathered from the words themselves and in the context of the entire speech made by the appellant on that occasion. It is the natural and ordinary meaning as understood by reasonable members of the audience at the Bedok car park on that evening using their general knowledge and common sense. Such meaning is not confined to a literal or strict meaning of the words, but includes any inferences or implications which could reasonably be drawn by such persons: see para 4.04 of *Duncan and Neill on Defamation* (2nd Ed) ...

[22] The meaning must be gathered from the actual words used themselves and in the context of the article. In the context of these appeals, one of the essential ingredients was admitted by the defendant, that is, the impugned statement was published. That fact was an agreed fact.

[23] Upon perusal of the learned High Court judge's grounds of judgment, we found that he had made a finding that the impugned statement had indeed referred to the plaintiff. Such can be seen from para 10 of his grounds of judgment. We reproduce the relevant paragraph for convenience:

> [10] Saya juga dapati pengataan-pengataan defendant tersebut secara lansung merujuk kepada plaintiff. Adalah jelas defendan telah menyebut nama plaintif secara terang dan nyata di dalam pengataan beliau.

[24] The learned High Court judge relied on the dissenting judgment of Her Ladyship Justice Zainun Ali JCA (as she then was) in the case of *Chong Swee Huat & Anor v Lim Shian Ghee (t/a L&G Consultants & Education Services* [2009] 3 MLJ 665 and concluded that the plaintiff failed to prove that as a result of the impugned statement the plaintiff's reputation has been adversely affected and tainted:

> [12] ... Di dalam *Chong Swee Huat & Anor v Lim Shan Ghee* [2009] 1 MLRA 392,

Mahkamah Rayuan memutuskan bahawa plaintiff perlu mengemukakan keterangan membuktikan bahawa reputasi, kedudukan telah diburukkan oleh pengataan-pengataan berkaitan, menurut pandangan dan pendapat orang ramai dan akibatnya plaintif dibenci dan dijauhi oleh orang ramai.

[13] Berdasarkan keterangan yang dikemukakan saya dapati plaintif tidak dapat membuktikan kedudukan tersebut. Plaintif hanya mengemukakan keterangan pendapat beliau sendiri bahawa maruah telah tercalar dan menjadi buruk akibat pengataan yang dibuat oleh defendan. Pendapat plaintif ini tidak disokong oleh mana-mana keterangan lain yang dapat menunjukkan bahawa akibat dari pengataan defendan, orang ramai telah menjauhkan diri dan mengelak dari berjumpa plaintif.

[25] This court in the case of *Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700 reiterated that impugned statements must be viewed not in isolation, but rather in the context of the totality of the whole statement of which the impugned statement was but a part thereof:

[15] At the outset, we would state that the test to be applied when considering whether a statement is defamatory of a plaintiff is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. *Gatley on Libel & Slander* (10th Ed) on this point at pp 108 and 110, inter alia, states as follows:

> It is necessary to take into consideration, not only the actual words used, but the context of the words.

It follows from the fact that the context and circumstances of the publication must be taken into account, that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.

[16] Still on the same point in the case of *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 Lord Bridge of Harwich in delivering the speech of the House of Lords at p 70 had quoted this passage as follows:

> ... the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and the antidote must be taken together.

[26] We observed that the learned judge failed to follow the settled principles of law and had not made any finding on the matters as discussed above. In our judgment the impugned statement in its natural and ordinary meaning are clearly defamatory of the plaintiff and adversely affecting his reputation. As LP

Thean J, in the case of *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* explained that in determining the natural and ordinary meaning of the words complained of, the sense or meaning intended is irrelevant nor meaning in which the words as understood by the plaintiff relevant. Even extrinsic evidence should not be considered admissible in construing the said words. The meaning must be gathered from the actual words used in the context of the of the article. Having examined the impugned statement, we are of the considered view that the learned judge failed to direct his mind correctly in that regard when he concluded that the words in its natural and ordinary meaning were not defamatory.

[27] In our judgment the impugned statement is derogatory, calculated to incite hatred and anger amongst the multi-religious groups and ethnicity in Malaysia. the impugned statement not only described the plaintiff as a fraudster, a liar who incites hatred of the Islamic religion, but also as a person funded and supported by foreign entities, such as the United States of America and the European Union. In their natural and ordinary meaning, the impugned statement meant and was understood to mean by reasonable and ordinary readers of the article that the plaintiff is anti-Islam. Therefore, taking the bane and the antidote of the article published the impugned statement had only one purpose, that is, to tarnish the plaintiff's character and reputation.

JUSTIFICATION AND FAIR COMMENT

[28] The learned High Court judge had proceeded to consider the defence of justification and fair comment, in abundance of caution, in the event that he was wrong in holding that the impugned statement was not defamatory as against the laintiff. This appeared in paras 19–20 of his grounds of judgment:

> [19] Saya dapati defendan telah gagal membuktikan kedua-dua pembelaan yang dikemukakan. Asas utama pembelaan justifikasi ini ialah plaintif adalah peneraju Lawyers for Liberty dan Lawyers for Liberty ini telah diberikan dana dan plaintiff telah menyalahgunakan dana ini. Keterangan-keterangan yang dikemukakan oleh defendan gagal menunjukkan bahawa apa yang dikatakan oleh defendan bahawa plaintif mencari makan melalui penipuan, fitnah dan hasutan sama sekali gagal dibuktikan. Tidak ada keterangan yang dikemukakan oleh defendan menunjukkan plaintif melakukan perkara-perkara tersebut.
>
> [20] Defendan juga gagal membuktikan pembelaan komen adil (*fair comment*). Saya bersetuju dengan penghujahan peguam plaintif bahawa defendan sebenarnya membuat allegasi dan tidak memberikan komen apabila membuat pengataan-pengataan tersebut. Pengataan-pengataan defendan ini juga tidak berasaskan fakta sebenar kerana defendan sendiri tidak mengetahui fakta apa yang di katakan.

[29] The defence did indeed plead justification and fair comment. The defence of justification is a complete defence but to succeed in the defence of justification, it is imperative that the defendant establish the truth of all the material statements in the words complained of.

[30] Lord Finlay in *Sutherland and others v Stopes* [1925] AC 47 (HL), at pp 62–63 explained:

> Such a plea of justification means that the libel is true not only in its allegations of fact but also in any comments made therein… the defendant has to prove not only that the facts are truly stated but also that any comments upon them are correct.

[31] This court in *Dato Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor* [2014] 4 MLJ 242 said in order to succeed in the defence of justification:

> … the defendants had to prove that the said defamatory statement as published by the defendants over TV3 was true, or was substantially true. When juxtaposed next to each other, the statements from the plaintiffs tweets and that of the defendants as published by them in the impugned report, the defendants had not only given an unwarranted slant to the tweets but also they had added facts allegedly attributable to the tweets when these added facts were not tweeted by the plaintiff in those tweets.

[32] We agree with learned High Court judge that the defendant failed to show to the court that what is said in the impugned statement was true or substantially true. Not a silver of evidence was adduced by the defendant to support that the impugned statement was indeed precisely true or, if at all, even remotely true.

[33] In *Dato Seri Mohammad Nizar bin Jamaluddin* this court explained that for the defence of fair comment to succeed it must be proven that the defamatory statement made is an expression of opinion on matter of public interest upon which everyone is entitled to make fair comment:

> [50] The law on the defence of fair comment is that if a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.
>
> [51] The comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not to have to prove the truth of every fact

provided the comment was fair in relation to those facts which are proved. However, fair in this context, does not mean reasonable, but rather, it signifies the absence of malice. The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. If the claimant can show that the publication was made maliciously, the defence of fair comment will not succeed.

[34] In this case, the learned High Court judge had ruled that the defendant had made unverified allegations of the plaintiff and thus, the defendant cannot succeed in the defence of fair comment.

[35] Applying these principles to the present case, we find no reason to interfere with the decision of the learned judge. We agreed with the learned High Court judge that the defendant, with respect, cannot succeed in the defence of fair comment.

CONCLUSION

[36] Having considered the decision of the learned High Court judge in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we were of the respectful view that there is an appealable error that had been shown by the appellant that could properly justify an appellate intervention.

[37] The decision of the learned High Court judge cannot, in the circumstances be sustained and is hereby set aside. On the evidence, the defendant is found liable for the defamation and that he had failed to establish the defence of justification and fair comment. With regards to damages we find no reason to depart from the decision of the learned High Court judge that the sum of RM100,000 is a reasonable amount as damages.

[38] The Appeal 1490 is allowed with costs and Appeal 1668 is dismissed with costs. We awarded global costs of RM10,000 to be paid to the plaintiff subject to payment of allocatur and ordered the refund of the deposit.

Appeal 1490 allowed; Appeal 1668 dismissed; decision of High Court judge set aside with global costs of RM10,000 subject to payment of allocator.

Reported by Dzulqarnain Ab Fatar